

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

March 23, 2006

In the Matter of
Massachusetts Highway Department

Docket No. 2006-015
File No. 141-0354
Dedham

RECOMMENDED FINAL DECISION

The petitioner, Dedham Westwood Water District has appealed a Superseding Order of Conditions (SOC) issued to the Massachusetts Highway Department (MHD) pursuant to the Wetlands Protection Act for a project known as the “Rt.195/I93 Bridge, Phase III.” I now recommend dismissal of this claim for failure to prosecute.

The petitioner operates a public water system that draws water from the White Lodge wellfield in the Fowl Meadow Aquifer. Notice of Claim (Claim), page 1. The wellfield supplies over 3 million gallons of water a day to the Dedham Westwood Water District (DWWD) which it then provides to the population of the two Towns as drinking water. Id. The petitioner’s Claim raises concerns about the quality of its supply of drinking water, and specifically the “trend of increasing concentrations of sodium and chloride which are beginning to cause customer complaints related to salty taste of drinking water.” Id. Explaining that it has performed numerous studies and investigations to identify the source of the increasing amounts of sodium and chloride, the petitioner now believes it has established that the “overwhelming



source of sodium and chloride is indeed the road salt applied on the I95/I93 near the White Lodge wellfield” by MHD. The petitioner also states that the I95/I93 interchange is located in the approximate middle of the Zone II recharge area for this wellfield and that runoff from the existing and modified highway flows into this Zone II. Id. The petitioner recounts that it has asked MHD to propose mitigation measures to reduce its use of road salt in the area, and MHD has not responded with any substantive mitigation measures. Claim, page 1-2. Given this background, DWWD was evidently pleased with special condition # 43 in the Order of Conditions for the phase III bridge work issued by the Dedham Conservation Commission, which provided:

The use of sodium chloride for winter de-icing on any Mass Highway owned and operated roadways in the Town of Dedham is prohibited. The Department of Environmental Protection shall agree with the Dedham Westwood Water District on acceptable alternatives to be used, specifying the maximum application rates that Mass Highway will be permitted to use for each of the ice control alternatives.

The Order of Conditions was appealed to the Department’s regional office for issuance of a SOC.

The Department’s SOC, which is the subject of this appeal, affirmed the Commission’s decision, but deleted three of the conditions in the Order – including special condition #43. The petitioner complains that no explanation of the decision to remove that condition was provided in the SOC, but does not specifically request its reinsertion in the permit through this appeal.¹ The petitioner’s Claim does include two requests for relief. First it seeks an additional special condition in the SOC requiring MHD to meet with the DWWD to “review the MHD road deicing practices along I95/I93 within the Zone II recharge area of the White Lodge Wellfield and Fowl

¹ The claim does state “The deletion of Special Condition #43, and absence of inclusion of an acceptable alternative, by the DEP fails to protect the interests set forth in 310 CMR 10.00 wherein the Wetlands Protection Act requires activities not to impact groundwater drinking supplies, among other protected interests.” Claim, page 2.

Meadow Aquifer” and require MHD to propose mitigation measures to reduce or strictly monitor road salt application to the I95/I93 intersection, or alternatively, identify “a specific section of the state highway that passes closest to the town wellfield where restriction on road salt usage would be greatest given the close proximity to the public water supply. Claim, page 2. DWWD also requests that DEP mediate a meeting between the MHD and DWWD to discuss the road deicing mitigation measures and seek a mutually acceptable resolution between the parties. Id.

After reviewing the Claim and identifying missing elements, I issued an Order to File a More Definite Statement requiring the District to supplement its Claim in order to satisfy the prerequisites for a valid appeal. Specifically, the petitioner was required by the Order to submit 1) a copy of the appealed document, 2) an explanation of its standing to request the appeal, and 3) documentation of its prior participation in the permitting process. In response the petitioner provided only a copy of the SOC. I then issued a further Order to File a More Definite Statement, allowing the petitioner another opportunity to submit information to establish its standing and document its required participation in the prior permit review process. This second Order required the petitioner’s response to be filed by March 15, 2006.

Nothing was filed in response to the second Order by the petitioner. However, on March 14, 2006, this office received a letter from Donald A. Yonika, Conservation Agent, on behalf of the Dedham Conservation Commission.² The letter, dated March 13th, states its purpose is to confirm the participation of DWWD in the public hearing process for the project. In support of this statement the letter explains “to the Commission’s recollection, [DWWD] attended each of

² The petitioner called the Case Administrator of this Office on March 14, 2006 to confirm receipt of the Commission’s letter, suggesting that the petitioner was under the impression that the letter would satisfy the petitioner’s obligation to respond to the Order. Both Orders were directed to the petitioner, and described with particularity the information missing from the Claim and required by the rules as elements of a valid appeal.

the hearings (and the several continuances thereof) on the subject Notice of Intent, and submitted voluminous data relative to water quality impacts the District indicated were attributable to the actions of the applicant.” With respect to the petitioner’s standing, the Commission states in its letter that it considers the DWWD a “party aggrieved, as they are the sole source supplier of water to the residents of both the Towns of Westwood and Dedham, and would suffer injury quite unlike the individual residents of either Town, as a result of applicant’s proposed activities...” Commission’s letter, March 13, 2006.

Compliance with the Orders - Failure to Prosecute

The petitioner did not provide the information required by the Order for a More Definite Statement or the Further Order for a More Definite Statement. Failure to include required information in an initial Notice of Claim, and failure to respond to an Order for a More Definite Statement constitute grounds for dismissal. 310 CMR 1.01(6)(b), 1.01(5)(a)15.f.vi and 1.01(10). The consequence of dismissal, specifically described in the rules and repeated in the two Orders issued in this case, is plain:

When the contents of a notice of claim do not meet the requirements of 310 CMR 1.01 and any other applicable regulations, the Presiding Officer shall dismiss the appeal or require a more definite statement. If the person filing the notice of claim fails to file a more definite statement within the period specified, the appeal shall be dismissed.

310 CMR 1.01(6)(b). I therefore recommend dismissal pursuant to 310 CMR 1.01(5)(a)15.f.vi and 310 CMR 1.01(10) for failure to prosecute.

The Commission’s Submittal

Although the petitioner did not respond to the Orders, the letter submitted on behalf of the Dedham Conservation Commission included information concerning its views on DWWD’s

prior participation in the permitting proceeding and the petitioner's standing. As it was submitted on behalf of the Commission, and for the additional reasons explained below, the letter does not meet the petitioner's burden of filing a Claim that satisfies the requirements of 310 CMR 1.01(6)(b), of responding to Orders to File More Definite Statements directed to the petitioner, or of going forward under 310 CMR 10.03(2) in a wetlands appeal. The requirements of the Orders fell upon the District as the entity requesting the adjudicatory hearing, however, even if I consider the information submitted by the Commission, it does not supply the required information necessary to perfect the petitioner's claim.

Prior Participation

Previous participation in a wetlands permit proceeding is required in this matter as the Notice of Intent was filed after March 1, 2005. 310 CMR 10.05(7)(j), 310 CMR 10.10(12), SOC, page 1. Previous participation in the permit proceeding means "the submission of written information to the Conservation Commission prior to the close of the public hearing, requesting a Superseding Order or Determination, or providing written information to the Department prior to issuance of a Superseding Order or Determination." 310 CMR 10.05(7)(j) (emphasis added). Both the first and second Orders for More Definite Statements required the petitioner to submit documentation evidencing its prior participation. The petitioner did not provide any, although the unsworn statement filed by the Dedham Conservation Commission indicates "to the best of the Commission's recollection" that the petitioner attended the public hearing and submitted water quality data.

This information does not satisfy the specific requirement in the rule for documentation to be provided by the person requesting the appeal, of written comments submitted during the

permit proceedings and before the close of the public hearing. Assuming that another person might satisfy the petitioner's burden, the Commission's letter did not include documentation of any such written comments submitted by DWWD, or specify that water quality information from the petitioner was provided during the wetlands permit review and before the close of the Commission's public hearing.³ The unsworn statement of the Commission's "recollection" does not satisfy the petitioner's burden as the party requesting the appeal to document its prior participation at specific points in the review process through written comments as required by 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(j).

Standing

The petitioner's standing as an abutter, ten residents or citizen's group or person aggrieved, an unavoidable jurisdictional prerequisite, was also not clear from its initial Claim. With no assertion on this point from the petitioner's Claim, the Commission's letter conveyed its view "of the District's standing as a Person Aggrieved, because it "would suffer injury quite unlike the individual residents of either Town." Even presuming the petitioner's obligation to establish its standing to request an appeal might be satisfied by another party, the letter's contents are not enough to establish standing of the petitioner as a person aggrieved.

The wetlands regulations define a "Person Aggrieved" as:

Any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c 131, §40. Such person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved.

³ Presumably, the rule's emphasis on written submittals in establishing prior participation was meant to avoid reliance on the recollections of Conservation Commissions and others in later evidentiary disputes.

310 CMR 10.04 (definitions). A potential injury need not be proven to establish aggrieved person standing, however, “the person claiming aggrieved party status must present "sufficient facts" showing a possibility that the activity allowed by the Order of Conditions will cause the injury he alleges.” Matter of Town of Hull, Docket No. 88-022, Decision on Motion for Reconsideration, at 10, (July 19, 1998). The potential injury alleged must be causally linked to the agency action being challenged. Matter of NB Associates, Docket No. 85-91, Decision on Status of Charles River Watershed Association (February 24, 1987) [standing requires “a causal relationship or connection between the agency action complained of and the actual injury alleged”].

The work approved in the SOC for the phase III bridge project involves alteration and replacement of 20 linear feet of Bank, a protected wetlands resource area. SOC, Page 2. Nothing in the Commission’s letter explains how the approved bridge work will cause a potential injury to the petitioner, or indeed what the nature of that injury might be. The perspective of the Commission that the petitioner may suffer a unique injury different than the general public does not satisfy the petitioner’s burden of alleging a concrete injury within the scope of interests of the Wetlands Protection Act that will be directly caused by the approved project. Without such allegations, the petitioner’s standing as a person aggrieved cannot be found. See Matter of Algonquin Gas Transmission Co., Docket No. 98-154, 98-178, Ruling on Motion for Reconsideration (November 2, 1999) [upholding dismissal for lack of standing where petitioner’s alleged injury was remote and indirect and would not have been caused directly by the project approved in the SOC].

Stepping back to the petitioner’s concerns presented in its Claim, its contents similarly fail to establish standing as a person aggrieved, indeed, it was the lack of factual allegations as to

the basis of the petitioner's standing which prompted the Orders to File More Definite Statements.⁴ The Claim does explain DWWD's concerns regarding MHD's continued application of road salt on the highway near its wellfield. If increasing sodium chloride levels in the aquifer could be considered an allegation of injury to the petitioner, that injury must also be alleged to be directly caused by the work proposed in order to establish standing as an aggrieved person. The potential injury raised in the petitioner's Claim (increasing levels of sodium chloride in the raw well water) was not alleged to be caused or exacerbated by the bridge improvement work permitted by the SOC either in the petitioner's Claim or the Commission's letter.⁵ Because neither the Commission's letter or the petitioner's initial Notice of Claim include allegations of a potential injury to DWWD that would be directly caused by the bridge work approved in the SOC (or any other basis of standing), I cannot find the petitioner has standing as a person aggrieved, as suggested by the Commission.

I recommend dismissal of the petitioner's claim pursuant to 310 CMR 1.01(5)(a)15.f.vi and 310 CMR 1.01(10) for failure to prosecute.

⁴ Because the basis of the petitioner's standing was not asserted or made clear in its Claim, the Order for a More Definite Statement required clarification from the petitioner. A response to the Order might have established standing other than as a person aggrieved, however I address only that basis here because of the Commission's assertion in its March 13th letter.

⁵ In addition, no relief with respect to the substantive terms of the SOC was requested that links the petitioner's alleged injury to the work conditioned by the SOC under the Act. The relief requested would essentially have MassDEP arrange a meeting between MHD and DWWD to discuss alternative deicing practices, require MHD to propose and discuss alternatives, and if possible implement mutually agreeable changes. It is not at all clear that MHD's deicing practices occur within the jurisdictional areas where this project is proposed. The SOC authorizes alteration and restoration of 20 linear feet of Bank, which may not include any highway surfaces where deicing would occur. Furthermore, the issues in a wetlands permit appeal are limited by the extent of the Department's jurisdiction under the Act and the work proposed to occur within the jurisdictional areas. 310 CMR 10.02. The Department could not compel an applicant to mediate or negotiate with a third party concerning issues beyond the scope of its jurisdiction over the work proposed.

NOTICE

This decision is a recommended final decision of the Presiding Officer. It has been transmitted to the Commissioner for his final decision in this matter. This decision is therefore not a final decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c.30A. The Commissioner's final decision is subject to rights and reconsideration and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Ann Lowery
Presiding Officer

Adopted by Commissioner Robert W. Golledge, Jr., March 28, 2006.